A

PSC-NAVAL DOCKYARD SDN BHD

v.

MAHKAMAH PERUSAHAAN MALAYSIA, CAWANGAN PERAK & ANOR

B

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[JUDICIAL REVIEW NO: 25-16-2010]
10 MAY 2013

C

CIVIL PROCEDURE: *Judicial review - Application to quash award of Industrial Court - Claimant granted backwages and compensation in lieu of reinstatement for being unfairly dismissed - Gross negligence resulting in loss of sum - Defence of compliance with superior orders -*
D *Whether Industrial Court erred in decision - Whether intention an ingredient of negligence - Whether instructions by superior lawful*

LABOUR LAW: *Industrial Court - Award - Application to quash award upholding claimant's case of unfair dismissal - Whether Industrial*
E *Court committed an error of law warranting High Court's interference - Whether onus on employer to have called claimant's superior to rebut claimant's defence of compliance with superior order*

F

The applicant ('the company'), by way of the instant judicial review application, sought to quash the award of the Industrial Court in granting the second respondent ('the claimant') backwages and compensation *in lieu* of reinstatement for being unfairly dismissed from employment by the company. The claimant was dismissed after being found guilty of committing "gross
G negligence" which allegedly caused the company to lose RM196,619.05 being the balance that remained unpaid by a third party ('the purchaser') for purchase of the company's goods ('the goods'). The claimant, who was then the company's general manager of the procurement, sub-contract and warehouse division,
H had refused to accept a bank draft given by the purchaser when it turned up to collect the goods as he found the weight of the goods loaded onto the purchaser's lorries differed from that stated in the request for quotation document. When the claimant refused to allow the purchaser's vehicles to leave the company's
I yard with the goods, the purchaser's representative called the yard director cum Group CEO of the company ('Ishkandar Shah') who

instructed the claimant to estimate the value of the goods that were already loaded onto the purchaser's lorries, to accept a cheque for the estimated value and then release the goods concerned. The claimant had complied with the instructions. The company's finance department, however, failed to bill the purchaser for the balance due on the goods *ie*, the said RM196,619.05. The company issued the claimant a show-cause letter alleging that it was his gross negligence that caused it to lose that sum. The claimant raised the defence of compliance with superior orders. A domestic inquiry was convened following which he was dismissed. In its instant application, the company contended that the Industrial Court was wrong to have held that the company failed to prove that the claimant "intentionally failed to perform a manifest duty in reckless disregard of the consequences as affecting the property of the company". The company argued that negligence did not involve the element of intention. It also contended that the Industrial Court failed to consider that Ishkandar Shah's instructions to the claimant, if there were any, were not lawful and reasonable in the circumstances of the case. Lastly, the company submitted that the Industrial Court wrongly held that it was the company's responsibility, and not the claimant's, to have called Ishkandar Shah to testify.

Held (dismissing application with costs):

(1) The company's contention that intention was not an element of "gross negligence" was untenable and devoid of merits. Consequently, the Industrial Court did not err when it held that the company was required to establish that the claimant "intentionally failed" to perform his duties for the purpose of the charge of "gross negligence". (para 19)

(2) As the Industrial Court's finding of fact was premised on the right proposition of law where the ingredient of "gross negligence" was concerned, there was no reason for this court to interfere with it. It was perfectly reasonable for the Industrial Court, based on the circumstances of the case, to have accepted the claimant's reason that he could not accept the purchaser's bank draft for RM315,050 because of the difference in weight of the goods purchased. The court found as a fact that the claimant had received the green light to go ahead from his superior, Ishkandar Shah. (paras 15 & 21)

(3) The issue as to whether or not Ishkandar Shah's directive to the claimant was lawful or reasonable was raised for the first time in the instant application. It was not put to the claimant and was not part of the company's case before the Industrial Court. It was too late in the day for the issue to be raised. The Industrial Court could not be expected to have pronounced on a matter not submitted by the parties and not forming part of the company's case. (para 28)

(4) If Ishkandar Shah had no authority to instruct the claimant as he allegedly did, the company should have called him to testify on the ambit of his authority. The company did not adduce any evidence on the procedure to be followed with respect to any variation in the mode or form of payment, or that Ishkandar Shah had no authority to vary the form or mode or payment or that it was improper for the claimant to have obeyed Ishkandar Shah's instructions without prior clearance or approval from the executive committee of the company. The Industrial Court could not therefore be faulted for holding that the claimant was entitled to rely on the defence of superior order. (paras 30, 32 & 36)

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bata Malaysia Bhd v. Lim Yang Ker [1993] 2 ILR 247 ***(refd)***

Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Hoecheong Products Co Ltd v. Cargill Hong Kong Ltd [1995] 1 WLR 404 ***(refd)***

L Devan T Linga Nathan v. Hong Leong Bank Bhd [2008] 2 ILR 51 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53 HC ***(refd)***

Mohd Sayudzi Ismail v. PSC-Naval Dockyard Sdn Bhd (Now known as Boustead Naval Shipyard Sdn Bhd) [2009] 2 LNS 1152 ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837 FC ***(refd)***

Pengurusan Danaharta Nasional Bhd lwn. Choo Oh Kim & Yang Lain Dan Rayuan-rayuan Lain [2010] 4 CLJ 450 CA ***(refd)***

Pengurusan Danaharta Nasional Bhd v. Dato' Sng Chee Hua & Anor [2006] 8 CLJ 345 HC ***(refd)***

Stamford Executive Centre v. Puan Dharsini Ganesan [1986] 1 ILR 101 ***(refd)***
Tan Khim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC ***(refd)***
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***
Teng Tong Kee v. Nikmat Jasa Piling Sdn Bhd [2006] 1 CLJ 1199 CA ***(refd)***
Titan Polyethylene (M) Sdn Bhd v. Othman Busu [1997] 3 ILR 497 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, s. 20

Other source(s) referred to:
Anandan Krishnan, *Words Phrases & Maxims Legally & Judicially Defined*, LexisNexis, p 220
BR Ghaiye, *Misconduct in Employment*, 2nd edn, pp 334, 358
Marina Netto, *Contracts of Employment & Malaysian Industrial Law*, 2009, p 285

For the applicant - T Sivasubramaniam; M/s T Siva & Co
For the claimant - Nga Hock Cheh; M/s Nga Hock Cheh & Co

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

[1] The claimant/second respondent started off as an engineering officer with the Royal Malaysian Navy (RMN) Dockyard on 29 September 1983. In 1991 the said entity was corporatised and the claimant opted to be appointed as an executive in the new establishment called Naval Dockyard Sdn Bhd. With that he retired from the Navy. In 1995, this entity was privatised with its name changed to PSC-Naval Dockyard Sdn Bhd. It further underwent a name change reflecting the interest of the new controlling shareholder in Boustead Naval Shipyard Sdn Bhd.

Problem

[2] The claimant was the general manager of the procurement, sub-contract and warehouse division of the company when this unhappy episode unfolded. Trouble started on or about 15 June

2005 when it was said that he committed gross negligence in failing to collect a bank draft for the tendered amount of some 133 items of material from the purchaser NS Construction & Engineering. However there was a deficit in the weight of the items when compared to the request for quotation document and the claimant had refused to allow the purchaser's lorries to leave the site. The representative from the purchaser called the yard director and Group CEO of the company and after that the claimant got a call from the Group CEO to estimate the deficit in the weight and to accept a cheque for the estimated amount. That was duly done. No billing was done by the accounts department of the company for the balance amount and finally when the charge was preferred against the claimant, the company alleged that his gross negligence had caused the company a loss of RM196,619.05. The tendered sum was RM315,050.

[3] He replied promptly the show cause letter stating the express order of his superior in the person of the yard director cum Group CEO of the company. A domestic inquiry was convened and he was dismissed on 23 June 2006.

Prayer

[4] He filed his claim with the Industrial Court under s. 20 of the Industrial Relations Act 1967 for reinstatement and the Industrial Court on 22 April 2010 granted him compensation *in lieu* of reinstatement and backwages to the tune of RM267,750.

[5] The applicant/company applied to this court by way of a judicial review application for the award of the Industrial Court to be quashed.

Principles

[6] The main ground on which a judicial review may be granted is explained in *Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998] 2 CLJ Supp 53; [1999] 1 MLJ 44:

> Authorities have shown that an inferior tribunal, of which the Industrial Court is one, has no jurisdiction to commit an error of law (see *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147). If it does make such an error, then it exceeds its jurisdiction for which an order of *certiorari* may be issued

(Syarikat Kenderaan Melayu Kelantan Bhd). There is no degree of nullity and if there is an error of law on which the award of the Industrial Court is founded, such error must necessarily be without jurisdiction or in excess of jurisdiction (see *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1986] 12 MLJ 18).

Whether The Industrial Court Committed A Jurisdictional Error Of Law In Holding That Company Had Failed To Prove On A Balance Of Probabilities That The Claimant Had Intentionally Failed To Perform A Manifest Duty In Reckless Disregard Of The Consequences

[7] Learned counsel for the applicant company, Mr T Sivasubramaniam, had submitted that the Industrial Court committed a jurisdictional error of law in holding that in the charge of "gross negligence" in the discharge of the claimant's duty as set out in the charge the company must prove on a balance of probabilities that the claimant had intentionally failed to perform the manifest duty as so set out in the charge. The charge in the notice of inquiry dated 17 April 2006 reads:

> You had committed **gross negligence** by not adhering to the terms stated in the "Sales Approval" and "Tender Award" documents during the removal of the 133 items of materials owned by PSC-Naval Dockyard Sdn Bhd sold to NS Construction & Engineering between the period 15 June 2005 to 1 July 2005. Your negligence has caused PSC-Naval Dockyard Sdn Bhd monetary loss of RM196,619.05. (emphasis added)

[8] Learned counsel Mr T Sivasubramaniam quoted a passage from BR Ghaiye in *Misconduct in Employment* (2nd edn.) at p. 334 which explains negligence as follows:

> The word 'negligence' therefore means want of proper care or carelessness ...
>
> Dr. Wharton in his *'Law of Negligence'* paragraph 3 described negligence as "such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as produces in an ordinary and natural sequence a damage to another". **This will show that even in Law of Torts a negligent act is distinguished from an intentional act.** The word 'negligence', therefore, connotes three things, *viz*: (1) the state of mind which is opposed to intention, **(b) careless conduct** and (c) a duty to take care imposed by common law or statute law and its breach by such

careless conduct. Thus, in order to constitute negligence there should be a duty towards another person and there should be a breach of duty and **that breach should result from carelessness as opposed to either accidental factors or intentional and deliberate act of a person.** (emphasis added)

[9] He also referred to *Charlesworth & Percy on Negligence* (10th edn.), London, Sweet & Maxwell, 2011, which states as follows:

> **The first meaning Negligence as a state of mind is the opposite of intention.** An act is intentional when it is purposeful and done with either the desire or the object of producing a particular result. An act is negligent when it is done, not with the desire of producing a particular result, but actually producing that result by **carelessness or indifference.** (emphasis added)

[10] He followed up with a criminal law text by referring to JC Smith and Brian Hogan in *Criminal Law* (3rd edn.), London, Butterworths, 1973 which states that where a crime is not intentional, it may be negligent:

> It is clear that some crimes may be committed although it is neither intentional nor reckless with respect to some element in the *actus reus*, provided he is negligent with respect to it.

[11] As for Malaysian authorities, he cited *Bata Malaysia Bhd v. Lim Yang Ker* [1993] 2 ILR 247, where the Industrial Court stated that the correct burden of proof on the employer as follows:

> To succeed under negligence, the company must satisfy this court of the following elements: (a) duty of care, (b) breach of duty of care and (c) loss resulting therefrom.

[12] Learned counsel for the claimant/second respondent, Mr Nga Hock Cheh, responded quite rightly that his learned friend had quoted the authorities out of context and thus missed the point altogether. He lamented that had his learned friend continued further in BR Ghaiye *Misconduct in Employment* (2nd edn.) at p. 358 he would have corrected his own error as the meaning of "gross negligence", which was what the claimant was charged for and not mere "negligence", is explained as follows:

> Gross negligence is the 'omission' of the case which even inattentive and thoughtless men never fail to exercise. **The gross negligence may be equal to what is called in some cases 'wilful neglect or default'**. An act or an omission to do an act,

is willful where the person who acts, or omits to act, know that he is doing and intends to do what he is doing but if that act or omission amounts to a breach of that person's duty and therefore to negligence, he is not guilty of willful negligence or default unless he knows that he is committing and **intends to commit a breach of his duty** or **is reckless in the sense of not caring whether his act or omission is not a breach of his duty.** (emphasis added)

[13] It is only too obvious that the company cannot now change the goalpost as it were and settle for the charge of "negligence" instead of "gross negligence" and then challenged the award of the Industrial Court on the ground that it had misdirected itself on the ingredient of "intentionally failing to perform his duties".

[14] Mr Nga referred to the following key passages in the award on the burden of proof stated by the Industrial Court/first respondent for context and consideration such as:

And this onus or burden of proof on the company is based on a standard of a balance of probabilities (see *Union Construction, Allied Trades and Technician v. Brain* [1981] 1 RLR 224; *Smith v. City Glasgow District Council* [1985] 1 RLR, Court of Session; *Ireka Constructions Berhad v. Chanthiravathan a/l Subramaniam James* [1995] 2 ILR 11 and *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314). (page 7 of the Award)

The evaluation and findings on this matter will thus be premised upon the evidence adduced and admitted during the course of the trial of this reference before this court. The authority that I rely on for this course of action can be found in the case of *Dreamland Corp. (M) Sdn. Bhd. v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1. (page 11 of the Award)

In conclusion, *the Company in this case has failed to prove on a balance of probabilities the first element, ie, that the claimant had intentionally failed to perform a manifest duty in reckless disregard of the consequences as affecting the property of the company*, and as regards the second ingredient, ie the alleged consequential financial loss suffered by the Company, I need only refer to the company's evidence to decide on this issue; being mindful of the fact that the Company's stand was that the ultimate duty to issue

bills and collect payment upon them was the responsibility of the Finance Department of the Company. (page 21 of the Award) (emphasis added)

The Finding

In the final analysis of the evidence as a whole, in equity, good conscience and the substantial merits of this case, it is the finding of this court that the company has failed to establish, on a balance of probabilities that the claimants dismissal from employment was with just cause or excuse. In the circumstances, it is appropriate that this court intervenes to redress the wrong suffered by the claimant at the hands of the company. (page 23 of the Award)

[15] The finding of the Industrial Court being a finding of fact premised on the right proposition of law where the ingredient of "gross negligence" is concerned, this court sees no reason to interfere with it. At the end of the day, sufficiency of evidence is within the pure province and purview of the Industrial Court. As was observed by the Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 at p. 159; [1991] 1 MLJ 417 at p. 421:

> The first ground of appeal in essence impugns the decision of the Industrial Court on its merits and the decision of the judge for agreeing with that decision. On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute *'de novo'* and decide it on its merits. The Industrial Court had heard evidence from both sides and submissions by their counsel and it came to a decision exculpating Tang Seng Khow from the allegation in the fourth charge. Clearly this is a case where the tribunal had by virtue of the powers entrusted upon it by the Industrial Relations Act 1967 to weigh and evaluate the evidence of witnesses for the company and the evidence of Tang Seng Khow. It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come. See *Ashbridge Investments v. Minister of Housing and Local Government* [1965] 3 All ER 371 per judgment of Lord Denning MR at p. 374 which was quoted by Abdoolcader SCJ in *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 at p. 207 which reads as follows:
>
> > The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that *the court can interfere with the Minister's decision if he has acted on no evidence; or if he has*

> *come to a conclusion to which on the evidence he could not reasonably come;* or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or *vice versa*; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law. (emphasis added)

[16] The Industrial Court had properly appraised itself on what is required to be proved to satisfy the ingredient of "gross negligence" by referring to the following in its award:

... This expression has been defined in *Venkataramaiya's Law Lexicon* 2nd Edition (1980) at page 974 to mean:

> Failure to exercise reasonable care, skill and diligence is "gross negligence"(*Beal v. South Devon Rly Co.,* 129 ER 560).
>
> There is a distinction between negligence and gross negligence, although the exact dividing line is difficult to demarcate. "Gross negligence" connotes (a) higher degree of negligence; it is negligence not arising merely from some want of foresight or mistake of judgment but from some culpable default. In *Black's Law Dictionary*, the expression is defined as follows:
>
> > *The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life of property of another; such a gross want of care and regard for the rights of other as to justify the presumption of willfulness and wantonness. – Nanhelal v. Asst. Registrar, Co-operative Society, Narsinghpur* AIR 1970 MP 39 at p. 40;
>
> The expression "gross negligence" denotes a high degree of careless conduct. (*vide Charlesworth's Law of Negligence* [1938] Ed., p. 5; *Beni Madhava v. Commissioner, Jabalpur* AIR 1945 Nag 111). (emphasis added) (pages 11-12 of the Award)

[17] The tort of "gross negligence" also received judicial exposition in our industrial jurisprudence in *Pengurusan Danaharta Nasional Bhd lwn. Choo Oh Kim & Yang Lain Dan Rayuan-rayuan Lain* [2010] 4 CLJ 450 at p. 466; [2010] 3 MLJ 343 at p. 357 where the Court of Appeal stated as follows:

A Dalam *Ballentine's Law Dictionary* (3rd Ed.) 'salah laku yang disengajakan' atau dalam Bahasa Inggerisnya 'wilful default' telah ditafsirkan sebagai 'a conscious abstention by a obligator from doing that which reasonably and under the terms of the obligation he should have done'; dan 'kecuaian melampau' atau 'gross negligence' membawa maksud 'negligence to be want of even slight care. Acting, or committing to act in such a situation where there is a duty to act, not inadvertently but willfully and intentionally with conscious indifference to consequences so far as other person may be affected'.

[18] "Gross negligence" is defined in Anandan Krishnan *Words, Phrases & Maxims Legally & Judicially Defined, LexisNexis* at p. 220 as follows:

Gross Negligence *Culpa Lata*

Gross Negligence – the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.

[19] In the light of the consistent explanation as to what is "gross negligence" as opposed to "negligence", I cannot agree more with Mr Nga for the claimant that the company's contention that intention is not an element of "gross negligence" is untenable and devoid of merits. Consequently the Industrial Court did not err when it held that the applicant/company was required to establish that the claimant intentionally failed to perform his duties for the purpose of the charge of "gross negligence".

[20] COW1 the auditor of the company conceded that he did not allege "gross negligence" against the claimant and neither did the claimant commit any criminal breach of trust or make an illicit gain or profit from the non-collection of the bank draft in the context of the difference in weight of the items tendered for when the purchaser turned up for collection. Indeed the claimant was careful enough to counter check the weighing machine brought by CLW3, one Saravanan who represented the purchaser, to weigh the items. Mr Nga rightly and respectfully raised the question: So where is the evidence of "gross negligence" in the discharge of his duties as alleged by the applicant against the claimant/second respondent?

[21] The Industrial Court's finding of fact is unimpeachable and its award here unassailable. I agree that it is perfectly reasonable for the Industrial Court to have arrived at the conclusion based on the circumstances of the case to accept the reason why the claimant could not collect the bank draft for the full amount of RM315,050 as stated in the tender documents. The weight was different. Either there was going to be a stalemate with the claimant refusing to sign the exit pass for the purchaser's lorries to leave the yard or the claimant receiving a lesser amount in a cheque from the purchaser taking into consideration the estimated shortfall. The Industrial Court found as a matter of fact that the claimant did get the green light to go ahead from his superior Encik Ishkandar Shah, the yard director and Group CEO of the company, which evidence is corroborated by CLW3.

[22] Such a finding of fact is not repugnant but rather reasonable based on the evidence before the Industrial Court and this court must resist every temptation to reassess and reappraise the evidence as this court is not exercising an appellate but rather a supervisory jurisdiction.

[23] That being the case there is no necessity for this court to consider the next question of whether the alleged "gross negligence" did cause the company loss of RM196,619.05 being the balance that remained unpaid for the items.

[24] However for completeness and in deference to the applicant's contention that the Industrial Court had misdirected itself on the greater burden of proof in the need to prove "intentional default" in the discharge of his duties, I am constrained to reproduce below the analysis of the Industrial Court:

> In conclusion, the Company in this case has failed to prove on a balance of probabilities the first element, ie, that the Claimant had intentionally failed to perform a manifest duty in reckless disregard of the consequences as affecting the property of the Company, and as regards the second ingredient, ie the alleged consequential financial loss suffered by the Company, I need only refer to the Company's evidence to decide on this issue; being mindful of the fact that the Company's stand was that the ultimate duty to issue bills and collect payment upon them was the responsibility of the Finance Department of the Company.

COW1 (the auditor) in cross-examination testified as follows:

Q: Did the Finance Department send out the bill for the remaining items?

A: No.

Q: The billing should have been done by the Finance Department?

A: Yes.

Q: Until today there is no legal suit to recover the money form N.S. Construction?

A: I agree.

Q: Not even a bill sent to them for the balance?

A: I agree.

Q: So the remaining amount between RM315,050 minus RM118,430.95 has remained uncollected?

A: I agree.

Q: In fact, it would not be accurate to say that the money is lost?

A: I do not agree.

Q: If it was not collected how could you say it is lost?

A: It is not collected yet. It is accrued but not collected.

Q: So you cannot classify it as a loss. Agree?

A: It is not a loss at this point of time but it remains uncollected.

(pages 21-23 of the Award)

[25] Contrary to the allegations of the applicant, the Industrial Court has judiciously considered all the material evidence of the parties in coming to the clear and careful conclusion stated above. Though couched and crafted as a question of law, this first ground of challenge is in essence an invitation to the court to reassess and reappraise the evidence adduced, to enter as it were the wide and broad road of judicial interference on ground of insufficiency of evidence. This court must eschew every attempt to

deviate it from the straight and narrow road of non-interference with an Industrial Court award save for exceptional reasons not evident here.

Whether The Industrial Court Had Misdirected Itself In Law By Failing To Consider Whether The So-Called Superior Order Was Lawful And Reasonable In The Circumstances Of The Case

[26] In proving gross negligence against the claimant, all circumstances which prevented him from collecting the bank draft in question must be considered. In a nutshell, the claimant explained that he was obeying superior orders from Ishkandar Shah, the yard director and Group CEO, who intervened on account of the shortage in weight in the goods tendered for sale. The evidence of the claimant was that Encik Ishkandar Shah directed him by phone to estimate the value of the items already loaded onto the purchaser's lorries and accept a cheque from the purchaser for the estimated value and then release the goods concerned. Mr Saravanan CLW3, representing the purchaser, had also called Encik Ishkandar Shah earlier. The fact that the said Encik Ishkandar Shah was the superior of the claimant whose reasonable orders the claimant must comply with is confirmed by the company's witness COW2, the company's Human Resources and Administration Manager, who was also the prosecuting officer at the domestic inquiry. COW2 testified as follows:

Q: Is Ishkandar Shah the superior of the claimant?

A: Yes, he is the superior.

Q: Ishkandar gives instruction in the course of work and the Claimant has to comply?

A. Yes.

[27] That being established, Mr Sivasubramaniam for the company, now submits that the said order as proceeding from the claimant's superior, is neither reasonable nor lawful and that the claimant ought not to have obeyed his superior's instruction. It was contended that at the very least the claimant should have referred to two directors of the company who had approved the letter of award subject to the terms of the tender. In fact the

company castigated the claimant's defence of obeying his superior order as an "afterthought" and that was put by the applicant to the claimant under cross-examination in the Industrial Court.

[28] I agree with Mr Nga that the applicant/company had raised for the first time before this court the issue "whether or not Ishkandar Shah's directive was a lawful or reasonable one." In the true sense of the word, this contention was an "afterthought" not put to the claimant and not part of the company's case before the Industrial Court. It is far too late in the day to raise it now and to decry the alleged failure of the Industrial Court to take into account the said issue and thus committing a jurisdictional error of law. The Industrial Court cannot be expected to pronounce on a matter not submitted by the parties and not forming part of the company's case before it. As was stated by the Privy Council in an appeal arising from the decision of the Hong Kong Court of Appeal in *Hoecheong Products Co Ltd v. Cargill Hong Kong Ltd* [1995] 1 WLR 404 at pp. 408-409 on a point quite obvious but often obscured by the over-exuberance of counsel in optimising every opportunity to overturn a decision of a tribunal:

> ... **The principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well established** that it is unnecessary to quote from authorities such as *Tasmania (Owners of) v. City of Corinth (Owners of)* [1890] 15 App. Cas. 223, *Connecticut Fire Insurance Co v. Kavanagh* [1892] AC 473 and *Esso Petroleum Co Ltd v. Southport Corporation* [1956] AC 218. These principles apply equally where it is the court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open court it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event, however, even this modest examination did not take place. **The point appears to have been an afterthought.** It does, of course, happen from time to time that a court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them ... (emphasis added)

[29] If authority is needed for the point on the matter of the order not being lawful or reasonable not having been put to the claimant and thus the company is barred from raising it now, one can refer to the *dicta* of Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 at p. 658; [1995] 2 MLJ 770 at p. 794:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, without valid reasons, refrains from doing so, then he may be barred from raising it in argument.

[30] At any rate if indeed the said superior in Encik Ishkandar Shah had no authority to give such an instruction over the phone on 15 June 2005 with respect to a lesser sum to be received on account of a deficit in the weight of the items, the company could have called Encik Ishkandar to testify on the ambit of his authority which the company said the claimant ought to have known. On the contrary the evidence of the company through COW1, the auditor, was otherwise. Under cross-examination COW1 testified as follows:

> Q: As Ishkandar Shah is the superior of the claimant any directive from him would have to be complied with by the claimant?
>
> A: Yes.
>
> Q: As the Yard Director, Ishkandar Shah was in charged of the day-to-day administration of the Yard at the material time?
>
> A: Yes, at that point in time.
>
> Q: At the material time the Company was facing financial cash flow problem? You were the auditor?
>
> A: Yes.
>
> Q: He was in charged of the dockyard?
>
> A: Yes.

[31] One must bear in mind that the purchaser NS Construction & Engineering had in its bid letter expressly stated as follows: "Our offer subject to **same weight** as in RFQ." (emphasis added). "RFQ" stood for "Request for Quotation" which was issued by the company for this exercise and the "weight" referred to the weight ascribed to the 133 items of materials which was the subject matter of the charge against the claimant.

[32] No evidence was adduced by the company on the proper procedure to be followed with respect to any variation in the mode or form of payment. Neither was there any evidence adduced by the company to show that Encik Ishkandar Shah had no authority to vary the form or mode of payment as the yard director and the Group CEO of the company. Further there was no evidence adduced by the company that it was improper for the claimant to obey the order of Encik Ishkandar Shah who was his superior without prior clearance or approval from the executive committee of the company.

[33] As can be seen the claimant found himself in a most unenviable position: not to accept the instruction of his superior would be insubordination for which it is a misconduct that would justify dismissal. The claimant's original stand and stance was to stand firm and to steadfastly refuse to sign the gate pass when the purchaser took delivery of part of the tendered items. A judgment call had to be made for it was not disputed that the company was facing financial problems and in urgent need of cash flow for fuel and space for building materials for new patrol vessels. Against that backdrop it was most reasonable and logical and indeed nothing unusual for the Group CEO, who was also the yard director, to assume authority if not to exercise authority to deal with a delicate situation that called for an urgent resolution in such a manner as he deemed fit under the given circumstances.

[34] I agree with Mr Nga that the Industrial Court acted judiciously in appraising the facts and in applying the legal principles distilled from the Federal Court case of *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 3 CLJ 837 and adopted by the Industrial Court in *L Devan T Linga Nathan v. Hong Leong Bank Bhd* [2008] 2 ILR 51 where the court held that the dismissed employee had been the authorising officer's

subordinate and that the doctrine of superior orders applied. The relevant passage at pp. 66 to 67 of the case which facts are not dissimilar to the present case is reproduced below:

> The court views that the Doctrine of Superior Orders applies here on the authority of the Federal Court case of *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd* [2006] 3 CLJ 837 which held that the duty of an employee at common law is to comply with all lawful and reasonable orders given by the employer with respect to the performance of such functions within the scope of his employment. The orders from AR to the claimant to pay out the 7 cash cheques (CO1; A-G) issued by Sri MSK Agency Sdn Bhd totaling RM1.45 million were from his superior thus they were all lawful and even though some of the sums paid out were large amounts; yet they were reasonable in that they were directed by the first authorizing officer AR who himself had told the claimant that he would later obtain the signature of the branch manager.

[35] I cannot fault the learned Chairman's analysis of the factual matrix and the conclusion he arrived at that under the circumstances the claimant was entitled to rely and rest on the defence of superior order. By no ingenuity of legal argument can the Industrial Court be said under the circumstances to have committed a jurisdictional error in holding that the defence of superior order would apply. Even assuming for a moment that the Industrial Court ought to have considered if the order was lawful and reasonable, it had come to a proper conclusion that based on the exigency and extremity of the situation, the claimant was required to follow such an order proceeding from his superior.

Whether The Industrial Court Had Committed A Jurisdictional Error Of Law In Holding That It Was The Applicant/Company Who Ought To Have Called The Superior In Encik Ishkandar Shah As A Witness

[36] The company argued that the law provides that it is the person asserting a fact (in this case, the claimant) who has the burden of proving that fact; the fact being that his superior Encik Ishkandar Shah had given him the order. The company further argued that the Industrial Court asked itself the wrong question and took into account matters it ought not to have taken into account including failing to draw any adverse inference against the claimant for failing to call Encik Ishkandar Shah as a witness.

[37] It must be noted that the claimant had raised the defence of superior order at the very first opportunity in his reply dated 19 December 2005 to the show cause letter of the company as follows:

> The value of the Contract is RM315,050 subjected to no weight shortage, however after actual weightage, and weight shortage were confirmed, we were told by The Yard Director to accept the Cheque of RM200,000 first, pending further calculation. We have forwarded the cheque with a covering Memo to Finance (PSC-ND-4500-08(56) dated 15th June 2005) amounting to RM200,000. However I believed for some unknown reason Finance did not bank in the cheque but returned to us to return to NS Construction.

[38] It is trite law that an employer who seeks to dismiss an employee for misconduct must adduce the necessary evidence to justify it. In *Stamford Executive Centre v. Puan Dharsini Ganesan* [1986] 1 ILR 101 at p. 106 the Industrial Court observed:

> In a dismissal case the employer must produce convincing evidence that the workman committed the offence he is alleged to have committed and for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this court in ignorance of it …

[39] In *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, the Court of Appeal held that for dismissal cases the burden of proof lies on the employer to prove its case against the dismissed employee on a balance of probability.

[40] Still on the issue of burden of proof, the court in *Pengurusan Danaharta Nasional Bhd v. Dato' Sng Chee Hua & Anor* [2006] 8 CLJ 345 at p. 352; [2007] 2 AMR 184 at pp. 190-191 stated as follows:

> It is trite that where a party on whom such initial burden lies has discharged such onus, then the evidential burden shifts to the other party. **If the party on whom this initial burden rests fails to discharge it, the opposite party need not call any evidence to rebut the allegation** … (emphasis added)

[41] In a similar vein in *Tan Khim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147 at p 156; [1998] 1 AMR 465 at p. 475 the court explained what is often misconceived as follows:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it then the evidential burden shifts to the other party (see *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v. Pan Malaysian Cement Works Bhd* [1980] 2 MLJ 75, *Johana Bi Binte Abdul Kadir Marican v. Lawrence Lam Kwok Fon & Anor* [1981] 1 MLJ 139). What shifts is the responsibility of adducing evidence to discharge that burden (see *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86). When the burden shifts to the other party it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. **No adverse inference can be drawn against that party for failure to give evidence himself.** If he does not adduce any evidence when the burden has shifted to him he will fail. **If the party on whom the burden lies fails to discharge it the other party need not call any evidence.** In the event it will not avail him to turn round and say that the respondent has not established his. In such circumstances, as the Privy Council observed in *Raja Chandranath Roy v. Ramjai Mazumdar* 6 BLR 303 the respondent can say: **"It is wholly immaterial whether I prove my case or not. You have not proved yours"** (see *Selvaduray v. Chinniah* [1959] MLJ 254) (emphasis added)

[42] Indeed this misconceived argument that the dismissed employee ought to have called his superior Encik Ishkandar Shah had been regurgitated before in *Mohd Sayudzi Ismail v. PSC-Naval Dockyard Sdn Bhd (Now known as Boustead Naval Shipyard Sdn Bhd)* [2009] 2 LNS 1152 (Award No. 1152 of 2009) where the Industrial Court held as follows:

> On the Company's suggestion that the Claimant should have called the said Ishkandar as his witness to show his *bona fides* in this regard is to my mind totally repugnant to the rules of evidence and natural justice. If anyone had the obligation to call the said Ishkandar, it would logically and evidentially have been the Company as it, and it alone, had the duty to prove the built of the Claimant (see *Stamford Executive Centre v. Dharsini Ganesan (supra)*); moreover Ishkandar as Yard Director cum CEO was

> perceptibly the 'directing mind' and the senior person representing the top management of the company at the relevant time. Incidentally, he (Ishkandar) was said to have left the company sometime in November 2005 around about the time that the audit with regard to this matter was carried out by the 'new management' that had taken over the company. His evidence, had he been called as a witness, would undoubtedly have thrown some light on the charge leveled against the claimant one way or the other. It would also have given the claimant the opportunity, if need be, to defend himself in cross-examination (see *Anka Tackle Corporation Sdn Bhd v. Ong Seow Cheng* [2007] 4 ILR 385. (pages 19 to 20 of that Award and also at pages 19 to 20 of this Award)

[43] Mr Sivasubramaniam had relied on *Teng Tong Kee v. Nikmat Jasa Piling Sdn Bhd* [2006] 1 CLJ 1199 as proposition for not calling Ishkandar Shah as a witness. That in the words of Mr Nga is "at best misplaced if not a mistaken comprehension of the context in which the judicial enunciation was made." I agree with Mr Nga that the facts in *Teng Tong Kee*'s case are different and distinguishable from those in our present case. In *Teng Tong Kee* the claimant alleged a constructive dismissal of his service by one Mr Chua, a director of the respondent. It is trite law in industrial jurisprudence that in a case of constructive dismissal the burden of proof lies on the claimant to prove that the company had dismissed him by destroying the relationship of mutual trust and confidence (Marina Netto *Contracts of Employment & Malaysian Industrial Law* [2009] at p. 285). See also *Titan Polyethylene (M) Sdn Bhd v. Othman Busu* [1997] 3 ILR 497. The High Court held that the claimant had failed to adduce or introduce evidence to raise the issue that he had been dismissed. The Court of Appeal agreed with the High Court and held that the evidential burden (respecting the issue whether there was a dismissal) has not even shifted to the company as yet.

[44] Where a party failed to call a material witness without any reasons, the Supreme Court held in *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155; [1991] 1 MLJ 33 as follows:

> No reasons were given why all these persons were not called to give evidence. The learned trial judge invoked s. 114(g) of the Evidence Act 1950 against the appellants and we think he was quite correct under the circumstances to do so.

[45] The principle behind s. 114(g) of the Evidence Act 1950 must not be stretched beyond its parameter such as to produce a perverse result. It is a principle whose application is subject to the over-arching principle that the company must first discharge the burden of proving that the employee has been dismissed for a just cause and excuse. For the record it reads in full as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case.
>
> Illustrations
>
> The court may presume
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[45] By way of analogy, even in a criminal case the court would not permit the indiscriminate invoking of a s. 114(g) Evidence Act 1950 on adverse inference to exempt the prosecution from its legal burden of proving the guilt of an accused. If a witness is material to prove an essential ingredient of the offence, the burden is on always on the prosecution to prove. The Supreme Court had clarified and cautioned in *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 at p. 20; [1985] 2 MLJ 16 at pp. 18-19 as follows:

> The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s. 114 (g) of the Evidence Act. But *where the prosecution evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.* (emphasis added)

[47] In the present case, it cannot be gainsaid that the company bears the burden of proof that the instruction has not been given by the superior Encik Ishkandar Shah or that even if it had been given, it was not lawful and reasonable for the claimant to follow.

This the company had failed to do in not calling a material witness in the person of the yard director and Group CEO Encik Ishkandar Shah. Little wonder that the learned Industrial Court Chairman had referred to the company's stand that since the claimant had brought up the said Encik Ishkandar Shah as an alleged actor in the case, it was incumbent upon the claimant to secure Ishkandar's attendance in court, as a "rather muddled perception if ever there was one." (p. 19 of the award).

[48] The company had in its reply denied the instruction proceeding from the superior in the person of Encik Ishkandar Shah and as such it would merely need to produce him as a witness and to subject him to be cross-examined by the claimant. In fact this is a fit and proper case where s. 114(g) of the Evidence Act 1950 should be invoked against the company!

[49] In the circumstance I see the third ground of argument as being misconceived and misplaced. I can discern no jurisdictional error of law here in the Industrial Court having misdirected itself.

Pronouncement

[50] In the upshot I am not constrained to interfere with the award of the Industrial Court. Having read the award as a whole and having heard arguments from both sides, I am more than convinced that the Chairman had carefully considered all the evidence adduced and have evaluated them correctly. There is no error of law that would justify interference by this court.

[51] The application of the applicant/company was thus dismissed with costs of RM10,000.